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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON

Case No. PD-0804-19

IN THE COURT OF CRIMINAL APPEALS AUSTIN, TEXAS

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COURT OF CRIMINAL APPEALS
2/11/2020
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JOE LUIS BECERRA, Appellant

VS.

THE STATE OF TEXAS, Appellee

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ON PETITION FOR DISCRETIONARY REVIEW
FROM THE TENTH COURT OF APPEALS
WACO, TEXAS
COURT OF APPEALS NO. 10-17-00143-CR
AFFIRMING THE CONVICTION IN BRAZOS COUNTY
CAUSE NO. 14-03925-CRF-361

STATE'S BRIEF ON THE MERITS

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TRIAL COURT:	Hon. Steve Smith (Voir Dire & Motion for New Trial) Hon. J.D. Langley (Trial) 361 st District Court Brazos County, Texas

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STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas, by and through its District Attorney, and files this brief in response to the point of error alleged by Appellant, and would respectfully show the Court the following:

STATEMENT OF THE CASE

Appellant, Joe Becerra, was charged by indictment for the offense of Unlawful Possession of Firearm by a Felon. Tex. Penal Code § 46.04, (3 RR 38-39).

On March 7, 2017, Appellant pled not guilty to the offense. (3 RR 39). On March 8, 2017, a jury found Appellant guilty of the charged offense. (4 RR 46). On March 8, 2017, the trial court assessed punishment at fifty-five years in the ID-TDCJ. (4 RR 90). On April 3, 2017, Appellant filed a motion for new trial. (Supp. CR 97). On April 27, 2017, the trial court held the motion for new trial hearing and denied Appellant's motion. (5 RR 28). Also, on April 27, 2017, Appellant filed a notice of appeal. (Supp. CR 194).

The Tenth Court of Appeals affirmed Appellant's conviction on June 12, 2019. *Becerra v. State*, No. 10-17-00143-CR, 2019 Tex. App. LEXIS 4850, 2019 WL 2479957 (Tex. App.—Waco June 12, 2019, pet. filed). Appellant's motion for rehearing was filed on June 20, 2019, and denied on July 5, 2019. Appellant's Petition for Discretionary Review was filed August 5, 2019, and granted November 20, 2019.

STATEMENT OF FACTS

The State relies on the Statement of Facts contained in Appellant's Brief.

SUMMARY OF THE ARGUMENT

Appellant argues that the Court of Appeals erred in holding Appellant's Article V, Section 13 of the Texas Constitution and statutory claims under Articles 33.01 and 36.22 of the Texas Code of Criminal Procedure were procedurally defaulted. In response, the State argues the Tenth Court of Appeals correctly determined Appellant procedurally waived his claims.

However, should this Court find the claims were not waived, only twelve petit jurors decided the ultimate verdict in the underlying case.

STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR

The court of appeals correctly held that Appellant failed to preserve error concerning the presence of the alternate juror in the jury room by finding Appellant's objection and motion for mistrial to be untimely.

Alternatively, in the event this Court finds Appellant did preserve error for review, the trial court's instruction to the jury to disregard anything the alternate said before reaching a verdict was sufficient to cure any error.

The opinion of the Tenth Court of Appeals is consistent with this Court's precedent in *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010). The court of appeals followed *Trinidad* when it (a) determined that the specific error involved in this case is subject to the contemporaneous objection rule, and (b) held that Appellant failed to make a timely objection. *Becerra*, 2019 Tex. App. LEXIS 4850 at *5-6, & 2019 WL 2479957, at *1.

As this Court noted in *Trinidad*, "allowing [alternate jurors] to be present with regular jurors during their deliberations is more usefully conceived of as an error in allowing an outside influence to be brought to bear on the Appellants' constitutionally composed twelve-member juries," and such an error is controlled by Tex. Code Crim. Proc. art. 36.22. *Trinidad*, 312 S.W.3d at 28. This Court then found Article 36.22 to be subject to the contemporaneous objection rule. *Id.* at 29.

The facts of this case are similar to those in *Trinidad* in that this record shows that Appellant did not "suffer[] the verdict of a jury of more than twelve members in violation of Article V, Section 13." *Trinidad*, 312 S.W.3d at 28. Thirteen people went into the jury room to deliberate, but only the twelve jurors convicted Appellant. (4 RR 46-47). The alternate juror was removed before the jury rendered its ultimate verdict to the court, and the twelve jurors were instructed by the court to disregard the participation of the alternate juror. (4 RR 43). Appellant agreed to the trial court's instruction to the jury, and when he had the opportunity to question jurors concerning the influence of the alternate juror upon deliberations, he did not inquire. *Becerra*, 2019 Tex. App. LEXIS 4850 at *6, & 2019 WL 2479957, at *2.

By its ruling, the Tenth Court of Appeals followed *Trinidad*, which held that the presence of an alternate juror, who is removed prior to the rendering of the ultimate verdict, is controlled by Article 36.22 and is also subject to the contemporaneous objection rule. *Trinidad*, 312 S.W.3d at 28-29. The Tenth Court correctly viewed this issue as a violation of Article 36.22 and not a waiver-only constitutional violation as claimed by Appellant.

Appellant mistakenly relies on what he refers to as "uncontroverted evidence" from the hearing on the motion for new trial to stake his claim that this case presents a violation of Article V, Section 13 of the Texas Constitution rather than a violation of Article 36.22. (Appellant's Brief at 8). But, the "uncontroverted evidence" he

relies on is refuted by the record. The State called the trial court's attention to the presence of the alternate juror in the jury room. (4 RR 35). The alternate was removed, and the trial court instructed the jury to disregard the alternate juror's participation and resume deliberations. (4 RR 43). Only then did the twelve remaining jurors render their ultimate verdict. (4 RR 46-47). It is of no significance that thirteen jurors unanimously agreed upon Appellant's guilt prior to the alternate's removal because the trial court instructed the jury to disregard the extra vote for guilt. (4 RR 43).

The court of appeals was correct to further hold that Appellant's motion for new trial did not preserve error since no timely objection was made during trial.

This Court has held that a motion for new trial is sufficient to preserve error where there was "no opportunity to object to the trial court's action until after that action was taken." *Issa v. State*, 826 S.W.2d 159, 161 (Tex. Crim. App. 1992). On the other hand, where a defendant has the opportunity to object, a motion for new trial does not preserve error. *See Hardeman v. State*, 1 S.W.3d 689, 690 (Tex. Crim. App. 1999).

The court of appeals opinion in this pending matter is consistent with this Court's precedent in *Issa* and *Hardeman*. Appellant had the opportunity to object during trial when the trial court sent the alternate juror into the jury room after closing arguments. The court of appeals correctly observed that Appellant's trial

counsel was aware that an alternate had been selected during voir dire, and that the alternate was sitting with the jury throughout trial and at the time the jury was sent to deliberate. *Becerra*, 2019 Tex. App. LEXIS 4850 at *6, & 2019 WL 2479957, at *2.

Since a violation of Article 36.22 is subject to the contemporaneous objection rule, and since Appellant was afforded the opportunity to object and no timely objection was made, a motion for new trial could not have preserved this issue. *See Hardeman*, 1 S.W.3d at 690.

Appellant urges this Court to "...determine if Article V, Section 13 claims are preserved..." by a motion for new trial. (Appellant's Brief at 17). *Trinidad*, however, stands for the proposition that the presence of an alternate juror is controlled by Article 36.22 and is subject to the contemporaneous objection rule. *Trinidad*, 312 S.W.3d at 28-29. A true claim arising from Article V, Section 13 would include in its facts that a thirteenth juror had rendered the **ultimate** verdict of guilt. *See Trinidad*, 312 S.W.3d at 28.

Since only twelve jurors rendered the ultimate verdict in this case, Appellant's claim was properly addressed of as a violation of Article 36.22. The court of appeals correctly applied the precedent of this Court in this regard, and Appellant's point of error should be overruled.

Alternatively, in the event this Court finds Appellant did preserve error for review, only twelve members of the jury voted on the verdict after the trial court removed the alternate juror and gave curative instructions.

Courts generally presume the jury followed the trial courts instructions. Colburn v. State, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (en banc); see Thrift v. State, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005) (noting that the jury is presumed to follow an instruction to disregard evidence); Williams v. State, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996) (noting that the jury is presumed to follow the court's instructions as given in the jury charge). The trial court in the instant case removed the thirteenth juror and gave a curative instruction to disregard any participation by said juror before the jury returned a verdict. (4 RR 43). There is no evidence that the thirteenth juror influenced the jury in any way following his removal and the trial court's instruction to disregard.

PRAYER

Wherefore, premises considered, the State of Texas respectfully prays that Appellant's point of error be overruled, and that the conviction be in all things affirmed.

Respectfully submitted,

JARVIS PARSONS DISTRICT ATTORNEY BRAZOS COUNTY, TEXAS

John Brick

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing State's Brief was emailed to Lane Thibodeaux, Attorney for Appellant, at lanet1@msn.com and the State Prosecuting Attorney, at information@spa.texas.gov on February 6, 2020 .

John Brick

Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

I do hereby certify that the foregoing document has a word count of 2038 based on the word count program in Word 2010.

John**(**B**/**ick